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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

R. J. ROSS,

Plaintiff,

v.

BERNIECE W. HARRIS, ET AL.,

Defendants

STANLEY R. CAIDIN,

Plaintiff,

v.

BERNIECE W. HARRIS, ET AL.,

Defendants

STATEMENT AS TO JURISDICTION

Stanley R. Caidin and R. J. Ross, pursuant to the United States Supreme Court Rule 12, Paragraph 1, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has appellate jurisdiction:

I

The appeal herein is from an order made and entered by the District Court of the United States, especially constituted under Section 2284, 28 United States Code Annotated. By reason of the application of Stanley R. Caidin and R. J. Ross to the said District Court for an interlocutory and permanent injunction restraining the enforcement, operation and execution of an Act of Congress for repugnance

to the Constitution of the United States, the said application therefor was heard and determined by a District Court of three judges pursuant to Section 2282, 28 United States Code Annotated. By Section 1253 of United States Code Annotated, a direct appeal to the Supreme Court of the United States may be taken from the final decree made by such specially constituted District Court.

II

The act of Congress which is involved is Public Law 699, Chapter 721, Laws of 81st Congress, Second Session, which was enacted on August 16, 1950. The said Act, which is an act to authorize the exclusion from the mails of all obscene, lewd, lascivious, indecent, filthy or vile articles, matters, things, devices or substances, and for other purposes provide in part as follows:

> "That, upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails, for any obscene, lewd, lascivious, indecent, filthy, or vile articles, matter, thing, device or substance or is depositing, or is causing to be deposited, in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may (a) instruct Postmasters at any Post Office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership or association, to return all such mail matter to the Postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof, and all such mail matter so returned to the senders thereof, under such regulations as the Postmaster General may prescribe . . ."

III

The order appealed from was made and entered on the 25th day of February, 1952.

IV

The application for appeal was presented on March 25, 1952.

V

The order appealed from vacated a temporary restraining order issued in the above entitled causes and further the said order appealed from dissolved the specially constituted three-judge court. It was alleged in the respective complaints in the above captioned causes that Public Law 699 violated the 1st, 4th, 5th, 6th and the 8th Amendments to the Constitution of the United States, and Article III, Section 2, of the said Constitution of the United States. A temporary restraining order was continued in full force and effect by the specially constituted court. After the case was duly submitted on the application for an interlocutory and permanent injunction by Stanley R. Caidin and R. J. Ross, the court made and entered the order vacating the temporary restraining order, and dissolving the three-judge court as hereinabove set forth. It is from that final order of the court that this appeal is taken.

VI

The questions presented by this appeal are substantial and novel. The constitutionality of Public Law 699 has never been determined by the Supreme Court of the United States. Additionally, Stanley R. Caidin, as a sender of mail, is attacking the constitutionality of Public Law 699, and a novel question is presented to the Supreme Court of the United States, which question was itself suggested by the Supreme Court in the case of *Donaldson* v. *Reed Maga-*

sine, 333 U. S. 178, 92 L. Ed. 628, which question is applicable in the instant case, and which question may be phrased as follows: Whether or not Public Law 699, in violation of the first amendment, or any other constitutional provisions, abridge the freedom of speech or press of either the senders or the sendees of mail or money orders. In the instant case, Stanley R. Caidin, as a sender of mail, is attacking the constitutionality of the statute. The Supreme Court of the United States has never ruled directly on the constitutionality of the statute in question or any similar statute with respect to the rights of senders of mail. It is thus evident that important issues are presented by this appeal, and that substantial questions are raised which call for the appropriate exercise of appellate jurisdiction.

VII

The following decisions of this court are believed to sustain jurisdiction of this appeal under said Section 1253 of 28 United States Code Annotated:

St. John v. *Wisconsin Employment Relations Board*, 71 S. Ct. 375, 340 U. S. 411, 95 L. Ed. 386;

Radio Corporation of America v. *United States*, 95 Fed. Supp. 660, affirmed 71 S. Ct. 806, 341 U. S. 412, 95 L. Ed. 1062;

Fleming v. *Rhodes*, 67 S. Ct. 1140, 331 U. S. 100, 91 L. Ed. 1368;

Stafford v. *Wallace*, 42 S. Ct. 397, 258 U. S. 495, 66 L. Ed. 735;

Morgan v. *United States*, 56 S. Ct. 906, 298 U. S. 468, 80 L. Ed. 1288;

Brucker v. *Fisher*, 49 F. 2d 759.

Respectfully submitted,

HAROLD JUDSON,
STANLEY R. CAIDIN,
Attorneys for Plaintiffs.

APPENDIX "A"

ORDER DISSOLVING THREE-JUDGE COURT

Each of the above cases was based upon an order of the Postmaster General No. 44665 issued on November 30, 1950. It appears from verified affidavit of the defendant Harris, and is not disputed by the plaintiffs, that on October 15, 1951 the Postmaster General of the United States issued Order No. 48149, which revoked Order No. 44665. There is, therefore, no question presently requiring a hearing or determination by the District Court of three judges under Section 2282 or 2284 of Title 28 United States Code. It is therefore hereby ordered that the order of the three-judge court continuing in full force and effect the temporary restraining orders issued in the above entitled matters pending a decision by said three-judge court be, and the same is hereby vacated. The vacation of such orders on the ground that the issues have become moot is not to be taken to indicate that the members of the special court have thereby invited an inference that they are of the opinion that the cases initially raised issues requiring action by a court so constituted.

It is further ordered that the three-judge court constituted by the order of the Chief Judge of the United States Court of Appeals for the Ninth Circuit dated February 15, 1951 be dissolved and discontinued.

Dated this 5th day of February 1952.

(S.) WALTER L. POPE,
WILLIAM M. BYRNE,
PEIRSON M. HALL.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

R. J. Ross, *Plaintiff*,

v.

Berniece W. Harris, etc., et al., *Defendants*.

Stanley R. Caidin, *Plaintiff*,

v.

Berniece W. Harris, etc., et al., *Defendants*.

Appeal from the United States District Court for the Southern District of California, Central Division

---

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Solictor General, on behalf of the United States and pursuant to paragraph 3 of rule 12 of the Revised Rules of the Supreme Court of the United States, now files herewith Statement Op-

posing Jurisdiction and Motion to Dismiss or Affirm.

DATED: April 10, 1952.

PHILIP B. PERLMAN,
Solicitor General,

WALTER S. BINNS,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,

/s/ PAUL MAGASIN
PAUL MAGASIN,
Assistant U. S. Attorney,

Attorneys for
United States of America,
Defendant.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 12655-P.H.

R. J. Ross, *Appellant*,

v.

Berniece W. Harris, Postmaster of North Hollywood, California, et al.

No. 12810-P.H.

Stanley R. Caidin, *Appellant*,

v.

Berniece W. Harris, Postmaster of North Hollywood, California, et al.

Appeal from the United States District Court for the Southern District of California, Central Division

---

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Solicitor General, on behalf of the United States and pursuant to paragraph 3 of rule 12 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed or that the order of the United States District

Court for the Southern District of California be affirmed.

STATEMENT

This is a direct appeal from an order of a specially constituted three judge court convened under 28 U.S.C. 2282 because appellants had challenged the constitutionality of the obscene mail statute (the Act of August 16, 1950, 64 Stat. 451, 39 U.S.C. 259a) and sought an injunction against its operation. The order appealed from was dated February 5, 1952, and entered and docketed on February 25, 1952. Appeal was allowed by District Judge James M. Carter on March 25, 1952 and appeal papers were served on the United States Attorney for the Southern District of California on March 27, 1952.

The Act of August 16, 1950 (64 Stat. 451; 39 U.S.C. 259a) prevents the obtaining or attempting to obtain remittances of money through the mails for any obscene matter, thing, or device. Acting in accordance with the provisions of the statute, the Postmaster General, on November 30, 1950, issued Order No. 44665, holding that appellant Ross was violating the Act. The order also directed appellee Harris, the local Postmaster at North Hollywood, California, to return to the senders all letters addressed to appellant Ross.

Ross then instituted an action seeking both to have Order No. 44665 vacated on the ground that the 1950 Act was unconstitutional and to enjoin

Harris from refusing to deliver to Ross all mail addressed to him. Caidin, an attorney who represents Ross and who attempted to send letters addressed to Ross through the mail, instituted a similar action requesting the same relief. Temporary restraining orders were issued in both actions prohibiting Harris from obeying Order No. 44665. These temporary orders were continued in full force and effect by the specially constituted three judge court pending its decision of the questions raised by the case. However, on October 15, 1951, the Postmaster General issued Order No. 48149 which revoked Order No. 44665. On February 5, 1952, the three judge court ruled that in light of this revocation "there is, therefore, no question presently requiring a hearing or determination by the District Court of three judges under Section 2282 or 2284 of Title 28 United States Code." The Court also vacated its earlier order continuing in full force and effect the temporary restraining orders, but pointed out that its "vacation of such orders on the ground that the issues had become moot is not to be taken to indicate that the members of the special court have thereby invited an inference that they are of the opinion that the cases initially raised issues requiring action by a court so constituted."

ARGUMENT

The questions initially raised in this litigation are moot and do not require decision. In addition,

those questions are neither substantial nor novel and hence do not warrant extended appellate consideration by this Court.

1. Appellant's basic contention is that Order 44665 which prevented delivery to Ross of mail addressed to him was invalid. Their complaints accordingly sought to have the order vacated. But the Postmaster General's revocation of Order 44665 accorded to appellants the full relief for which they instituted suit. And it is obvious that this admission of Ross' mail to full mailing privileges pending the suits to enjoin the Order which excluded his mail from such mailing privileges moots the case and renders appellants' "contentions moot questions." *Lewis Publishing Co.* v. *Wyman,* 228 U.S. 610, 615; see *Fisher* v. *Baker,* 203 U.S. 174. The three judge court therefore properly disposed of the instant case on the ground "that the issues have become moot."

2. Even if appellants' contentions had not been mooted by the revocation of Order 44665, this appeal would present no substantial or novel legal question. The gravamen of appellants' complaints is that the statutes excluding obscene matter from the mails are unconstitutional. But the constitutionality of these statutes, which date back to Lincoln's administration, has long been established. See *Donaldson* v. *Read Magazine,* 338 U.S. 178, 190; *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 158; *Milwaukee Pub. Co.* v. *Burleson,*

255 U.S. 407, 410; *Public Clearing House* v. *Coyne*, 194 U.S. 497, 508; *Ex parte Jackson*, 96 U.S. 727, 736. Mr. Justice Brandeis, in his dissenting opinion in the *Burleson* case, *supra*, noted that the obscenity statute of March 3, 1865 (13 Stat. 507) was issued became law as recently as August 16, mails and that the "existence in the Postmaster General of the power to do this cannot be doubted." 255 U.S. 407, 421.

In this connection, it is significant that although the statute under which Order No. 44665 was issued became law as recently as August 16, 1950, that statute merely implemented the old obscenity statutes which have been in effect since 1865 and whose constitutionality, as already noted, is well settled. The legislative history of the bill which became the Act of August 16, 1950 shows that that Act was not intended to "unduly broaden the powers of the Postmaster General" but was enacted so as to "close the loopholes which are now used to violate the spirit of existing law with regard to mailing obscene and indecent matter." S. Rep. No. 2179 on H. R. 8767, 81st Cong. 2d Sess., p. 1, 2; H. Rep. No. 2335 on H.R. 8767, 81st Cong., 2d Sess., p. 1, 2.

CONCLUSION

For the foregoing reasons, it is evident that the three judge court properly disposed of the case on the ground that the issues were moot. It is also apparent that no substantial questions are raised in this litigation. We respectfully submit, therefore, that this appeal should be dismissed or that the judgment of the District Court be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. .....

No. 12655-PH

R. J. Ross,

Plaintiff,

vs.

Berniece W. Harris, *et al.*,

Defendants.

No. 12810-PH

Stanley R. Caidin,

Plaintiff,

vs.

Berniece W. Harris, *et al.*,

Defendants.

On Appeal From the United States District Court for the Southern District of California Central Division

Supplemental Memorandum in Support of the Court's Jurisdiction Under Section 1253 U. S. C. and in Opposition to the Motion to Dismiss or Affirm.

Pursuant to Rule 7 of the Revised Rules of the Supreme Court of the United States, appellants R. J. Ross

and Stanley R. Caidin herewith file their brief opposing the motion to dismiss or affirm, which said motion to dismiss or affirm and statement opposing jurisdiction have heretofore been filed by the Solicitor General on April 10, 1952, on behalf of the United States, pursuant to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States.

In the above described Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, the Solicitor General opposed the jurisdiction of this Court on the grounds (1) that the questions initially raised in the litigation were moot and therefore did not require decision by this Court; and (2) that such questions were neither substantial nor novel and hence did not warrant extended appellate consideration by this Court. In reply to the contentions thus advanced by the Solicitor General, appellants herein affirm that the questions involved on this appeal are both novel and substantial and additionally that the questions initially raised in this litigation are not moot, more particularly so by reason of governmental action subsequent to the denial of an interlocutory injunction by the 3-Judge Court, which said governmental action was taken pursuant to Public Law 699 the Act of August 16, 1950, 64 Stat. 451, 39 U. S. C. 259a) which has heretofore been attacked by the appellants herein in the 3-Judge District Court on the grounds of its unconstitutionality under the Constitution of the United States.

I.

The Questions Involved on This Appeal Are Both Substantial and Novel.

The constitutionality of Public Law 699 has never been determined by the Supreme Court of the United States. The Act is attacked by these appellants by reason of its violation of the First, Fourth, Fifth, Sixth and Eighth Amendments and by reason of its violation of Article III, Section 2, Clause 3, of the Constitution of the United States. Other objections to the constitutionality of the said statute have been presented by the appellants herein to this Court in their Assignment of Errors.

These objections to the constitutionality of Public Law 699 were presented to the 3-Judge Court upon the application of the appellants herein to the said Court for a temporary restraining order and preliminary injunction and for injunctive and declaratory relief. What is a substantial question has heretofore been defined in *United States v. Barbeau*, 92 Fed. Supp. 196 at page 202, where the Court in holding that the particular questions presented to it were substantial used the following language:

> "Is the question here involved a 'substantial' one? Light is afforded by the history of a similar application for bail pending appeal in the case of *Iva Ikuko D'Aquino (Tokyo Rose) v. United States*, 9 Cir., 180 Fed. 2d 271. After denial of bail by the District Judge and by the Court of Appeals, Justice Douglas ordered that the appellant be admitted to bail, saying that if the question involved is 'fairly debatable' it is 'substantial.' That the question involved in the present case is debatable is, perhaps, indicated by the earnestness of the debate upon it in this Court upon the motions. Having in view the duty of the Court to amply protect the rights of those

accused, and even convicted of crime, the decision as to whether the case is 'fairly' debatable may be left to the decision of the Court of Appeals."

In connection with the issue as to whether or not the unconstitutionality of Public Law 600 is "fairly" debatable, appellants have noted an increasing concern by this Court to protect the rights offered by the Constitution of the United States and more particularly by the First Amendment to citizens of the United States. The significance of this growing concern for constitutional rights, particularly where the First Amendment is involved, may be noted by this Court's own reaction to the fraud order statutes which have heretofore been promulgated by the Congress. Thus, although such statutes were originally declared to be constitutional a penumbra of doubt with respect to the constitutionality of such statutes has heretofore culminated in expressions by this present Court of substantial questions upon which this Court desired to hear arguments in connection with the constitutionality of fraud order statutes. This penumbra of doubt may be traced back to its source in the dissenting opinion of Justice Holmes, concurred in by Justice Brandeis, in the case of *Leach v. Carlile*, 258 U. S. 138 at 140, wherein Justice Holmes, in his dissenting opinion, concluded:

"The decisions thus far have gone largely, if not wholly, on the ground that if the government chose to offer a means of transportation which it was not bound to offer it could choose what it would transport; which is well enough when neither law nor the habit that the government's action has generated has made that means the only one. But when habit and law combine to exclude every other, it seems to me that the First Amendment in terms forbids such

control of the post as was exercised here. *I think it abridged freedom of speech on the part of the sender of the letters and that the appellant had such an interest in the exercise of their right that he could avail himself of it in this case. Buchanan v. Warley,* 245 U. S. 60; 38 S. Ct. 16, 62 L. Ed. 149. . . ." (Emphasis ours.)

This doubt by Justices of the Supreme Court with respect to the constitutionality of the fraud order statutes is rediscovered and represented more fully and explicitly in a footnote appended by the Court to *Donaldson v. Reed Magazine,* 333 U. S. 178, 92 L. Ed. 628, where the Court, prior to final argument, advised the parties as to those points as to which the Court wished to hear further argument. The Court, in a written memorandum, appended to its decision and set forth in 92 L. Ed., page 637, requested further argument as follows:

"This case is ordered restored to the docket for reargument. On reargument counsel need not further discuss the sufficiency of the evidence to support the Postmaster General's findings. They are requested to discuss the following:

1. Does the fraud order prohibit delivery of mail and postal money orders to Facts Magazine and all its employees, including its editor-in-chief? If so

(a) Is the order within the Postmaster General's authority under 39 USCA Secs. 259, 732, 9A FAC title 39, Secs. 259, 732:

(b) If so, do these code provisions, in violation of the First Amendment or any other constitutional provisions, abridge the freedom of speech or press of either the senders or the sendees of the mail or the money orders?

2. Does the fraud order prohibit indefinitely the delivery of mail or money orders which relate to subject matters or contests other than the contest on which the order is based? If so,

(a) Is the order within the Postmaster General's statutory authority?

(b) If so, are these code provisions in conflict with the Constitution of the United States?

3. Assuming that the order is in conflict with the code provisions or the Constitution, can it be modified in such way as to free it from statutory or constitutional objections? If so, by whom can the order be modified and by what procedure?"

The argument thus requested by this Court was never reargued, inasmuch as the order under consideration in the *Donaldson v. Reed Magazine* case, *supra*, was amended prior to rearguing and the constitutionality of the statute pursuant to which it had been issued was sustained on the narrow ground that the postal police power permitted the Postmaster General to control fraudulent puzzle contests where the order was so worded as to encompass only mail sent in response to the fraudulent contest. Since no sender complaint was actually before the Court at that time (and a sender complaint is before the Court at the present time), the Court refused to consider the question as to whether the rights of innocent senders of mail were violated, nor has this question with respect to the rights of innocent senders of mail been passed upon directly by this Court in any opinion that counsel have been able to ascertain.

To argue that the questions presented on appeal by this litigation, which questions were also presented to the 3-Judge Court are not substantial, is to do violence to

the considered queries which were explicitly in the minds of the respective members of this Court at the time that argument was presented to this Court in the *Donaldson* case, *supra*. Additionally, to argue that the question of the unconstitutionality of the statute here involved is not "fairly" debatable is to do violence to the position taken by Justice Holmes and Justice Brandeis in the dissenting opinion in the case of *Leach v. Carlile, supra;* since a fair implication may be drawn and inference made that where a dissenting opinion by a Justice of this Court is returned the questions involved in the litigation are "fairly" debatable.

Additionally, upon the application by appellants herein for a preliminary injunction, which application was made to the 3-Judge Court, briefs were submitted and the question with respect to the constitutionality of Public Law 699 was thereafter taken under submission for a period of almost one year. In connection therewith it may be noted by this Court that the order of the 3-Judge Court which was heretofore entered on the 25th day of February, 1952, dissolving the 3-Judge Court and denying a preliminary and permanent injunction, was made on the ground of mootness and by reason of the fact that the order of the Postmaster General No. 44665 which was complained of by the appellants herein had theretofore been revoked by order No. 48149, which latter order was issued by the Postmaster General on October 15, 1951. As appellants will hereafter show the revocation of the original order No. 44665 was a preliminary phase in the Postmaster General's activities pursuant to the powers delegated to him by Public Law 699 and it may be fairly presumed that lacking the revocation order which is hereinabove described, the 3-Judge Court would

have ultimately after long and serious consideration of the opposing contentions made by the adversaries in the litigation rendered an opinion on the merits of the subject involved. It may not be gainsaid or controverted therefore, that the 3-Judge Court itself by continuing a temporary restraining order dated January 25, 1951, in full force and effect for more than one year had serious reservations concerning the constitutionality of Public Law 699 and that therefore the questions involved were "fairly debatable" within the meaning of *United States v. Barbeau, supra.*

Additionally, the issues raised by these appellants in their attack upon the constitutionality of Public Law 699 involves the extent to which the federal police power is limited by due process of law. The Solicitor General has argued that the Court has upheld this type of statute in the past, but Public Law 699 is a new statute and therefore involves a new police power encroachment by the Postmaster General upon the constitutional rights of persons and citizens of the United States. If this Court refuses to consider such encroachment and other new encroachments as they occur each time in the future, and refuses to consider whether such encroachments violate the constitutional rights of persons and citizens of the United States, each such new encroachment will be deemed constitutional by default. It is submitted that the judicial function is thus deprived of all sustenance by such argument; beside the obvious dangers which will accrue to the liberties of persons and citizens.

It is therefore respectfully submitted that the 3-Judge Court procedure was properly invoked by reason of the substantial constitutional questions raised involving the appellants herein.

II.

The Issues Which Are Before This Court on Appeal Are Not Moot.

A. Where an order issued by the Postmaster General pursuant to Public Law 699 has been revoked, a suit theretofore brought in the Federal Court by persons affected by the operation of the statute for injunctive and declaratory relief to determine the constitutionality of the statute pursuant to which such orders are issued does not become moot, where it is likely that the order complained of may be replaced by another of substantially similar import.

The Supreme Court of the United States has consistently reaffirmed the principle of law that an action will not be dismissed as presenting a moot case in a suit to enjoin the enforcement of an order issued by a quasi-judicial body, because the time during which such order was by its express terms to continue in force has expired, or the order has been revoked, where it is not unlikely that the order complained of may be replaced by another of substantially similar import, and where there is therefore a necessity of deciding a question of law to serve as a guide to the body which can reasonably be expected to act again in the same matter.

In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 515, 31 S. Ct. 279, 283, 55 L. Ed. 310, the Supreme Court said, in answer to the defense that the order appealed from had expired, that sometimes a different conclusive factor is shown.

In that case it was held that expiration of the order of the Interstate Commerce Commission did not make the case moot. The Court said, at page 316:

> "The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time, the carriers, have their rights determined by the Commission without a chance of redress."

In *Gay Union Corporation v. Wallace,* 112 F. 2d 192, certain sugar producers appealed from a decision of the Secretary of Agriculture, denying allotments. On appeal, the Government raised a preliminary issue, that the case was moot. The ground of this was that on September 11, 1939, shortly after the outbreak of war in Europe, the President suspended the provisions of Title II of the Sugar Act, and that this had the effect of removing the restrictions on the marketing of sugar. The result, the Secretary said, was to grant appellants as great, if not greater, relief than any which could possibly be granted by an order of the Court. The Court said, in answer to the Government's contention, at page 195:

> "Doubtless this is true so far as concerns any relief which this court can afford appellants with relation to an allotment for the year 1939. But while the case was under consideration by us, the President revoked his earlier suspension, and the Secretary has now reinstated his regulations governing notice and hearings to establish new allotments . . . From this, it seems not unlikely that the order complained of may be replaced by another of substantially

similar import, and that appellants, in the current year, will find themselves in the same position as in the preceding year, since, in the very nature of things, it will be again impossible to secure a court review and obtain a decision before the end of the allotment period . . . It is . . . true that, unless the rights of the parties under the regulation complained of are determined, the result in the present year will be again to leave appellants without remedy. We think, in these circumstances, that even though we are without power to grant the specific relief prayed, our duty is to determine the question presented."

A comparatively recent case decided by the Supreme Court of the United States, namely, *Porter v. Lee*, 328 U. S. 246, 66 S. Ct. 1096, 1099, 90 L. Ed. 1199, is considered a leading case on whether or not a question is moot. One Bevan was sued for forcible entry in the Justice of the Peace Court of Kenton County, Kentucky, to allow the landlord to recover possession of his apartment. The Price Administrator filed in Federal Court an injunction to order the respondent not to prosecute eviction proceedings against Bevan or any other tenant, and to restrain them from violating the rent regulations. The injunction was denied. While the case was in the process of appeal to the Circuit Court of Appeals, the state court evicted the tenant. The Circuit Court of Appeals held the question moot. Justice Black, speaking for the Supreme Court said:

"We also think the Circuit Court of Appeals erred in holding that the case was moot . . . Moreover, here the Administrator sought to restrain not merely the eviction of Bevan but also that of any other tenant of the landlord as well as any other acts

in violation of the regulation . . . The issue as to whether future violations should be enjoined was still before the court and was by no means moot."

B. After the denial of injunctive and declaratory relief by the 3-Judge Court, the Post Office Department instituted new proceedings, Post Office Department Action No. H. E. Docket No. 1/269, pursuant to Public Law 699, on April 10, 1952 directed against appellant Ross herein, which said action is now pending and the object whereof is the issuance of a new order against appellant Ross of exactly the same type as, and to replace, the above described order No. 44665. In connection therewith there is attached hereto and marked Exhibit A and made a part hereof as though herein incorporated in full, a true and correct copy of "Notice of Hearing," which said notice was served upon appellant Ross concurrently with the complaint in the above described pending Post Office Department Action No. H. E. No. 1/269.

Factually, appellants herein anticipated that the revocation of order No. 44665 by the Postmaster General was a temporary phase engaged in by the Postmaster General to raise the issue of mootness upon this appeal. If this is not so, an inference with respect thereto nevertheless presents itself for the serious consideration of this Court. This Court in *Southern Pacific Terminal Co. v. Interstate Commerce, supra,* has been careful to point out the fact that considerations with respect to the validity of orders ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review. The appellants herein, having been put to the expenses of litigation ought not to be deprived of their right to ascertain the constitutionality of Public Law 699 by any

action by the Postmaster General which is subject to an inference that such action was taken to avoid review by this Court. Nevertheless the Solicitor General has seriously contended in his Statement Opposing Jurisdiction and in his Motion to Dismiss or Affirm that the appeal has become mooted by reason of the revocation of order No. 44665. By such jack-in-the-box procedures adopted by the Postmaster General the appellants now find themselves in the position they were in prior to the time the original order was revoked. But the appellants have urged herein that the Postmaster General has been acting and issuing orders pursuant to an unconstitutional statute, to wit, Public Law 699. In *Boise City Irr. & Land Co. v. Clark,* 131 Fed. 415, the Ninth Circuit Court of Appeals, on a similiar state of facts, said a case was never moot in a situation in which there is the necessity of deciding a question of law to serve as a guide to the body called upon to act again in the same matter. And to the same effect, see *United States v. Trans. M. O. Freight,* 166 U. S. 290, 308, 17 S. Ct. 540, 41 L. Ed. 1007; *Federal Trade Com. v. Goodyear Tire & R. Co.,* 304 U. S. 257, 58 S. Ct. 863, 82 L. Ed. 1326, and *Panama Ref. Co. v. Ryan,* 293 U. S. 388, 413, 414, 55 S. Ct. 241, 79 L. Ed. 446, where the rule announced in the *Southern Pacific Terminal* case, *supra,* is reaffirmed.

It is of course true that when an actual controversy exists, of which if coercive relief could be granted in it, the Federal courts would have jurisdiction, they may take jurisdiction under the Federal Declaratory Judgment Act of the Controversy to grant the relief of declaration

either before or after the stage of relief by coercion has been reached.

Bochards Declaratory Judgments, pp. 619-621;

Nashville, Chattanooga and St. Louis R. R. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730;

Black v. Little, 8 Fed. Supp. 867;

Chester C. Fosgate Co. v. Kirkland, 19 Fed. Supp. 152;

Ohio Casualty Co. v. Plummer, 13 Fed. Supp. 169;

Gully v. Interstate Naitonal Gas Co., 82 F. 2d 145.

Upon appeal from an order of a 3-Judge Court denying injunctive relief, this Court will upon a proper showing grant declaratory relief.

United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 754.

It is respectfully submitted that appellants herein have presented by their respective complaints on file herein matters appropriate for a judicial determination of the constitutionality of Public Law 699 by a declaratory judgment. The interests of these appellants require the use of this judicial authority for their protection against present actual interference by the Postmaster General, more particularly in the interference in the delivery of mail transmitted to appellant Ross by his attorney, appellant Caidin. It is respectfully submitted that such interference is a "definite prejudicial interference" within the meaning of *United Public Workers v. Mitchell, supra.*

Conclusion.

For the foregoing reasons it is respectfully submitted:

1. That the questions involved on this appeal are both substantial and novel; and

2. That this Court has jurisdiction despite the revocation of order No. 44665 upon this appeal from an order of a 3-Judge Court denying an interlocutory and permanent injunction.

Respectfully submitted,

STANLEY R. CAIDIN,
DANIEL J. BLOOMGARDEN,
Attorneys for Appellants.

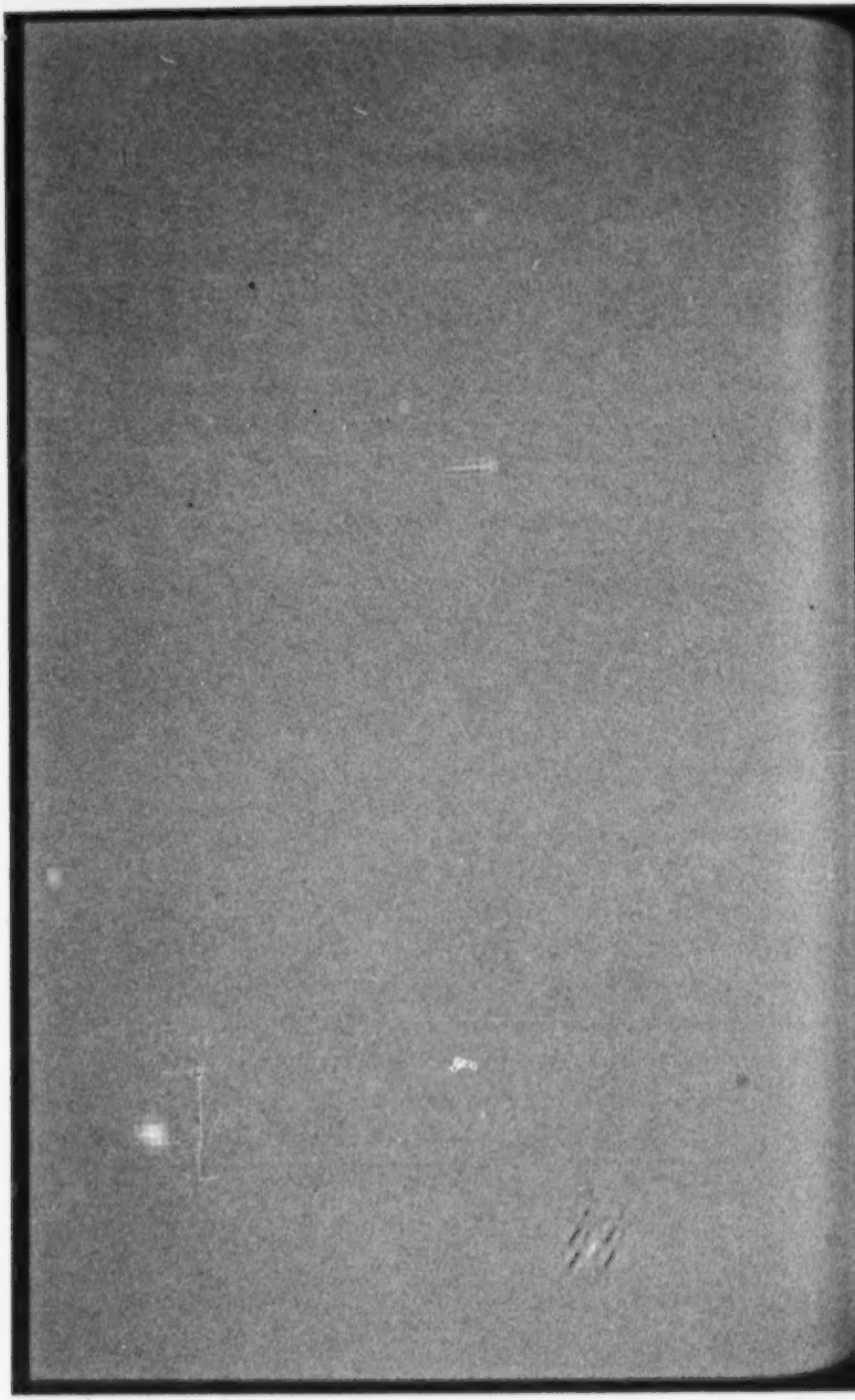

EXHIBIT A.

Post Office Department, Office of Hearing Examiners, Washington 25, D. C.

In the matter of the Complaint That R. J. Ross, Roy Ross, and Roy Ross Co., at North Hollywood, California, and Jay Ross, R. J. R., and Box 765, at Sherman Oaks, Van Nuys, California, are engaged in conducting an unlawful enterprise through the mails as set forth in the attached complaint. H. E. Docket No. 1/269.

April 11, 1952.

NOTICE OF HEARING.

Transmitted herewith is a duplicate originial of the Complaint which has been filed in this proceeding pursuant to the enclosed Rules of Practice. It is recommended in the Complaint that the Postmaster General issue an order pursuant to the provisions of the statutes cited therein.

NOTICE IS HEREBY GIVEN that a hearing in the above-entitled proceeding will be held before me on May 6, 1952, at 10:00 a.m., in Room 3237, New Post Office Department Building, 12th and Pennsylvania Avenue, N. W., Washington 25, D. C.

If you desire to file an answer to the Complaint, the original and three copies thereof must be filed with the Docket Clerk, Office of Hearing Examiners, Post Office Department, Washington 25, D. C., on or before April 28, 1952. The requirements for the filing of your answer and your appearance at the hearing are set forth in the enclosed Rules of Practice.

DANIEL J. KELLY,
Chief Hearing Examiner.

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(7-9-51)

No. 790. ROSS ET AL. *v.* HARRIS, POSTMASTER, ET AL. Appeal from the United States District Court for the Southern District of California. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Harold Judson* for appellants. *Solicitor General Perlman* for the United States.

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